(1) Supreme Court, U.S.

No. 001705 MAY 10 2001

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In the

Supreme Court of the United States

JERRY A. PHILLIPS,

Petitioner,

-versus-

COMPUWARE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is retaliatory discrimination against an employee for having engaged in protected activity actionable under the ADEA where the retaliatory measures fall short of "ultimate employment decisions" sufficient to trigger a substantive ADEA violation (such as discharge or demotion), but amount to tangible adverse employment actions of a less severe type (such as withdrawal and reassignment of customer accounts and territories, imposition of unattainable sales quotas, or undeserved negative performance ratings)?

2. Whether, in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), an ADEA plaintiff must still prove *both* that an employer's asserted reason for an adverse employment action was false *and* that age discrimination was the real reason, in order to avoid summary judgment, as opposed to a motion for judgment as a matter of law.

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The opinion of the Fifth Circuit Court of Appeals is unreported. It has been reproduced at Appendix 1a to this petition. The Court of Appeals adopted as the basis of its decision the District Court's Memorandum and Order granting Compuware Corporation's motion for summary judgment. That decision is also unreported. It has been reproduced at Appendix 3a to this petition.

JURISDICTION

The Court of Appeals' opinion and judgment was filed February 9, 2001. No motion for rehearing was filed.

The District Court had jurisdiction after removal from state court under 28 U.S.C. §§ 1331, 1332(C)(1), and 1334. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 623 provides:

(a) **Employer practices**

It shall be a unlawful for an employer-

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

* * *

(d) **Opposition to unlawful practices; participation in investigations, proceedings or litigation**

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter.

STATEMENT OF THE CASE

A. Facts Relevant to the Issues Submitted for Review

This petition arises from a pre-*Reeves*[1] summary judgment granted in favor of Petitioner Jerry Phillips' employer, Respondent Compuware Corporation, in an Age Discrimination in Employment Act of 1967[2] (ADEA) case alleging substantive age discrimination and retaliation.

Compuware hired Phillips in July 1996 as a sales person for its Uniface software product. R. 1290.[3] Prior to being

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[1] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[2] 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq.

[3] Since this is a summary judgment case, and, at this stage of the

employed by Compuware, Phillips had been a successful software sales person for nearly 20 years, winning many sales awards and being a top producer for several employers. R. 1290. During the first year, Phillips was employed with Compuware, sales of the company's computer software products were low company-wide. R. 1288. During a July 2, 1997 telephone conference with Alan Cantrell, Compuware's vice president of its Central Region and Phillips' ultimate supervisor at the time, Mr. Cantrell informed Phillips (who was 40 years old at the time) that the company had made a decision to "get rid of" all of the "old men" or "old guys" like Phillips from the sales force. R. 1287. Phillips' regional manager, Richard Larrabee, Jr., also participated in this conference call, and did not contradict Cantrell's statement of the company's intention. *Id.*

The next day, Phillips began a previously planned vacation. R. 1287. Upon his return, he immediately protested to Larrabee the company's plan to eliminate older sales persons. Larrabee then threatened Phillips that if he did not "drop" his protestations, he would face adverse action by the company. *Id.* Nevertheless, Phillips repeated his protests about the company's plan to get rid of the "old guys," and throughout August of 1997, Larrabee repeatedly warned Phillips that he would face adverse company action (refusal to consider him for transfer to Dallas) if he did not "drop it" (i.e., his protests of the

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litigation, *all* credibility choices *must* be resolved in favor of the non-movant (Phillips) and all evidence in conflict with his must be ignored, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), this statement of facts disregards summary judgment evidence submitted by Compuware which is contrary to the evidence submitted by Phillips. Compuware did, indeed, dispute several aspects of Phillips' testimony and, *at trial*, the jury will be entitled to consider and weigh that conflicting evidence. For summary judgment purposes, however, it must be disregarded, *Reeves*, 530 U.S. at 150-51; *Hunt v. Cromartie*, 526 U.S. 541 (1999), and, therefore, is not included in this statement of facts.

company's plan to eliminate older employees from the sales force). R. 1286, 1285, 1287.

When Phillips continued to protest the company's plan to "get rid of" older employees from its sales force, he was placed on a formal "Sales Action Plan," which stated that he would be sanctioned, including by termination of his employment, if he did not attain a "wholly unrealistic and unattainable sales quota" within six weeks. R. 1240, 1285, 1286.[4]

Believing the Sales Action Plan to be a "transparent scheme" to "trump up" a facially justifiable reason for the company to fire Phillips when the real reasons for his termination would be to silence his protests about the company's illegal plan to eliminate older employees, (R. 1285, 1286) Phillips initially declined to sign the Plan. R. 1286. Instead, he wrote to Compuware's President protesting Cantrell's threat to terminate the "old guys" and the "transparent scheme". Two older sales persons, aged 50 and 57, had already been, or about to be, terminated at the time of Cantrell's "old men" statements. *Id.* In response, Compuware deprived Phillips of a substantial portion of his sales territory and potential accounts in the Dallas area. *Id.* On October 16, 1997, Larrabee sent a letter to Phillips informing him that if he did not execute the Sales Action Plan by Friday, October 24, 1997, (or submit a resignation by that date), his employment with Compuware would be terminated as of that date. R. 1285, R. 1186. Phillips responded by having his lawyer send a letter to

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[4] Specifically, the "plan" required that Phillips achieve $1 million in Uniface service contracts, plus $375,000 in Uniface product sales, by September 30, 1997, when the company's chairman and CEO had told Phillips that it would take up to two years to sell the product, R. 1289, and service contract sales for the entire 27 person sales force for the whole quarter ended September 30, 1997 were only $7,806,599 ($289,000 per salesperson, on average) and for product sales amounted to only $2,465,406 ($91,311 per salesperson) R. 952.

the company's general counsel stating that Phillips had no interest in resigning, and in fact wanted to stay at Compuware as long as possible. R. 1184. With that letter, Phillips returned the Sales Action Plan (and the FY 98 Comp Plan) signed, but with a handwritten notation stating, "the goals in the plan are not realistically attainable. I do not agree that the company has no obligations as stated therein." R. 1180.

When he did not hear from Compuware by October 24, 1997, Phillips assumed that he had been terminated, in accordance with Larrabee's October 16, 1997 letter.[5] R. 1284. Larrabee responded that Phillips had satisfied the demands of his letter by returning the Sales Action Plan, signed, even though he had expressly refused to accept its terms, R. 1171, so he had not been terminated. R. 1171. Larrabee gave Phillips back his office keys and voice mail, whereupon Phillips resumed his duties and performed several tasks requested by Larrabee during the following week. R. 1284.

On October 30, 1997, Larrabee sent a letter to Phillips stating, "I feel certain that [your] continued employment with Compuware serves no purpose. Consequently, Compuware does not wish to reinstate you, for any reason . . ." R. 1158. He then sent an Employee Status Change Form to the Human Resources Department indicating that Phillips' employment with the company had been involuntarily terminated for "non-performance of job responsibilities," effective October 31, 1997.[6]

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[5] Phillips evidenced that understanding of his status by an e-mail sent to Larrabee on October 24, 1997, stating that since he had not heard from Larrabee in response to the October 20 lawyer's letter, "I gather I have been fired," and Asince you fired me, I have turned in my office keys and laptop." R. 1178. Phillips also sent an e-mail to the Human Resources Department evidencing a similar understanding of his status ("I have been terminated involuntarily by Compuware today.". R. 1176.

[6] Larrabee testified that this course of action - involuntary termination - had been necessitated because Phillips was "refusing to resign." R. 0151.

Phillips filed an EEOC charge and later a lawsuit claiming he had been fired and otherwise retaliated against because of his protests of Compuware's plan to "get rid of the old guys" and because he himself was one of the "old guys."[7] Compuware responded to Phillips' prima facie case[8] by asserting that the real reason for Phillips' departure from the company was not discriminatory action taken against him, but his own voluntary resignation from his job. However, Compuware's own employment records, signed by Larrabee on October 31, 1997 and approved by his manager on November 3, 1997, state that Phillips' termination of employment, which occurred on October 31, 1997, was "involuntary." R. 1144. Moreover, other summary judgment evidence overwhelmingly established that Phillips did not resign.[9] Thus, at least for

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[7] In addition to terminating Mr. Phillips, and Messrs. Heck, age 57, and Gorzynski, age 50, Compuware also terminated two of the other "old men" on the Uniface sales force - Ken Matsagas, age 53, and Felix Nidzgorski, age 44. At least three salesman hired as Uniface executives during 1997, Mr. Pzioufas, Gaffney and Brown, were in their thirties. *Id.*

[8] Phillips' evidence showed that he was constructively discharged; that he was qualified for the position; that he was within the protected class at the time of his discharge; and that he was one of the "old men" Cantrell had said the company planned to "get rid of." Those are the elements an employment discrimination plaintiff must provide evidence to demonstrate in order to establish a prima facie case. *E.g. Reeves*, 530 U.S. at 142. The district court "assumed" that showing to be sufficient to constitute a prima facie case of discrimination. (Memorandum and Order at 16; App. 17a).

[9] When asked during his deposition why he had checked "involuntary" rather than "voluntary" on that Employee Status Change Form, Larrabee testified that it was because "Jerry was refusing to resign." R. 0151.

Indeed, in a letter to Larrabee four days before he was terminated, Phillips had stated, "I . . . will never resign." R. 1160. Previously, Phillips' lawyer had written to Compuware on October 20, 1997 that, "Phillips is not interested in leaving Compuware" and "he intends to stay as long as possible," especially in view of his wife's medical condition at the time, which would make it very difficult for him to commence employment

summary judgment purposes, the pretextual nature of Compuware's explanation for Phillips' departure from the company (he was not fired, he voluntarily resigned), was indisputably established.

Compuware pled alternatively that if it were found to have been untruthful with its proffered explanation for Phillips' departure from the company, it would then show that the "real reason" for Phillips' termination of employment was that he had been fired (rather than having resigned as the company most resolutely insisted) on account of (1) poor sales, (2) negative attitude toward the Uniface product Phillips was hired to sell, and (3) insubordination in refusing to sign the Sales Action Plan and FY 98 Comp Plan. The company continued to insist, however, that it did not actually terminate Phillips for any of those reasons.[10]

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elsewhere. R. 1184. Phillips himself sent an e-mail to Larrabee on October 27, 1997 stating, "I very much desire to continue as a Compuware employee," R. 1162, and repeatedly told Larrabee that he was not resigning. R. 0155, R. 0153. Further, as Larrabee repeatedly acknowledged, there was no resignation letter submitted by Phillips , R. 0153, 0154, and he never told anyone he had resigned, wished to resign, intended to resign, or had resigned.

[10] Specifically, the affidavit of Peter Karmanos, Jr., founder, CEO, and Chairman of the Board of Compuware, expressly states, "Phillips was not fired by Compuware, he resigned." R. 0399. In other words, Phillips was not let go because of poor sales, or negative attitude, or insubordination.

John Shevillo, Senior Vice President of Enterprise Solutions and Phillips' ultimate supervisor, also swore that, "[Phillips] was not terminated." That assertion is, self-evidently, a disavowal that poor sales, negative attitude, insubordination, or any other non-discriminatory reason, led the company to fire Phillips. The affidavit Joseph A. Nathan, President and COO of Compuware, is to the same effect, expressly disavowing that Phillips was terminated, thereby disclaiming any of the reasons cited by the district court as the "real," legitimate basis for his discharge.

Finally, Richard Larrabee repeatedly testified in his deposition that he told Phillips *during the week of October 24* that he had not been

Even if the three hypothetical reasons for discharge had been asserted by Compuware as the "real reason" for Phillips' departure from the company, Phillips' summary judgment evidence demonstrated that that basis would have been pretextual. Concerning the purported "poor sales" explanation, at the time of his discharge, Phillips ranked 12th out of 27 Uniface sales persons for fiscal year 1998. R. 0956. None of the 15 sales people – more than one-half of the sales force – that ranked below him in sales was terminated on account of poor sales.

Concerning the proffered explanation that Phillips was really fired for insubordination in failing to sign the Sales Action Plan and FY 98 Comp Plan, Larrabee had expressly stated in an e-mail dated October 26, 1997 that since Phillips had signed and returned those documents (albeit with a handwritten qualification that he did not regard the goals as achievable), "you have not been terminated." R. 1171. Company senior vice president John Shevillo undermined the "poor attitude" justification (which was not identified on the Employee Status Change Form as a reason for the involuntary termination at all events) by stating, "I think you're one helluva guy. I've told you that before. It's not bullshit . . . You're a good family guy, *the clients like you*, and Richard and I, I think, have a program and road map for you to be successful, and I would like you to reconsider and stay . . . I don't want you to go." R. 1223-1222 (emphasis added).

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terminated, and, in fact, stated he would not even accept Phillips' resignation at that time (at least, not without having a chance to talk to him in person).

Most significantly, the Employee Status Change Form shows that neither insubordination, bad attitude, nor poor sales was a reason for Phillips' involuntary termination from employment. The reason for termination stated by Larrabee at the time on the Form makes no mention, hint, or suggestion of any of these matters as being a factor in Phillips' firing. R. 1144.

B. Disposition Below

The district court granted Compuware's motion for summary judgment. The Court of Appeals affirmed that judgment in a one and one-half page order (App. 1a), which expressly approved and adopted as the basis for decision the "analysis made by the trial court in its thorough, comprehensive, and scholarly Memorandum and Order signed February 17, 2000 and entered of record on February 22, 2000." (*Id.*)

The district court's memorandum and order (App. 3a) was issued before this Court's June 12, 2000 decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The district court held that "[t]he plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual, rather, a reason *cannot* be proved to be 'a pretext *for discrimination*' unless it is shown both that the reason was false, and that age discrimination was the real reason." (Memorandum and Order at 16; App. 17a) (first emphasis added; second emphasis in original). The Court of Appeals regarded that explication of the controlling law as correct and expressly affirmed on that basis. (App. 1a).

In disposing of Phillips' ADEA retaliation claim, the courts below found no violation from the denial of Phillips transfer request, his account reassignments, the Sales Action Plan with its explicit threat of termination, and the realistically unattainable sales quotas, because they were not "ultimate employment decisions," (Memorandum and Order at 22; App. 23a) and because Phillips had not raised a fact issue that the challenged treatment would not have occurred but for his complaints of age discrimination. (*Id.* at 23; App. 24a).

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted in this case for four reasons. First, this Court should resolve the conflict among the circuits as to whether retalitatory harassment not rising to a level of an "ultimate employment decision" can nonetheless be actionable as retaliation under 29 U.S.C. §

623(d); second, the Court should clarify that, contrary to the Fifth Circuit's holding below, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) governs summary judgment motions as well as motions for judgment as a matter of law; third, the Court should correct the Fifth Circuit's manifest disregard of *Reeves* and pretermit that circuit's (and other circuits') return to pre-*Reeves* jurisprudence and practice; and finally, the Court should clarify the scope and applicability of the exception hypothesized in the *Reeves* opinion concerning the circumstances under which a factfinder's verdict might be unsustainable despite evidence of a prima facie case and an untruthful explanation of its actions proferred by an employer.

1. The Courts Of Appeals Are In Conflict As To Whether Hostile Retaliatory Action Taken By An Employer, Which Does Not Quite Amount To An Ultimate Employment Decision, Is Nevertheless Actionable

Phillips claimed that, in addition to having been actually or constructively discharged from his employment due to his age, Compuware further violated the ADEA by undertaking retaliatory, discriminatory actions against him for his having opposed its stated plan to "get rid of" the "old men" or "old guys" from the sales force. Phillips' summary judgment evidence demonstrated that as a result of his protests of Compuware's discriminatory policy, he was at least twice told by a Compuware senior manager to "drop his protests" and that when he declined to do so, he was denied a transfer to Compuware's Dallas office, where most of his primary contacts and clients were located; was deprived of many of his most substantial accounts; and was discriminatorily placed on the Sales Action Plan, which imposed minimum sales quotas both subjectively and objectively impossible to attain within the brief, five week time period specified, upon threat of

termination if he failed to achieve them, all in violation of 29 U.S.C. § 623(d)(West 1999).

A plaintiff establishes a prima facie case of retaliation under the ADEA by showing: (1) that he engaged in activity protected by the ADEA; (2) that there was an adverse employment action; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *E.g., Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1225-26 (5th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997). The courts below rejected Phillips' retaliation claims because none of the conduct about which he complained amounted to an "ultimate employment decision," *citing Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997), and *Messer v. Meno*, 130 F.3d 130, 139-40 (5th Cir. 1997), *cert. denied*, 119 S.Ct. 794 (1999). (Memorandum and Order at 22; App. 23a). The central question presented by this case, and one which this Court has never addressed, is whether an "adverse employment action" must be an "ultimate employment decision."

The Courts of Appeals are severely split on this issue. On the one hand, the Fifth Circuit follows a restrictive standard and limits retaliation claims only to "ultimate employment decisions." *See, e.g., Mattern v. Eastman Kodak Co., supra.* "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting and compensating." 104 F.3d at 707. The Eighth Circuit has adopted the Fifth Circuit's construction. *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).

On the other hand, the First, Ninth, Tenth, and Eleventh Circuits have all held that the protection against retaliatory discrimination extends to adverse actions which fall short of "ultimate employment decisions." *See Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (actions other than discharge are covered by anti-retaliation provisions and listing as examples, "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote,

[and] unwanted negative job evaluations . . .") (internal citation omitted); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (construing Title VII's anti-retaliation provision to extend beyond "ultimate employment decisions"); *Wideman v. Wal Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("we join the majority of Circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions"). In addition, the D.C. Circuit has held that the ADEA anti-retaliation clause, which is identical to Title VII's, "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem Soc'y*, 935 F.2d 322, 331 (D.C. Cir 1991). *See also Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994) (stating that the ADEA's anti-retaliation provision covers more than discharge, demotion or failure to promote).

The restrictive interpretation of the identical anti-retaliation provisions in Title VII and the ADEA, which has been espoused by the Fifth and Eighth Circuits, is inconsistent with both the express language of those statutes and the congressional intent to protect employees against being subjected by their employers to tangible adverse consequences from having filed claims of discrimination or having opposed discriminatory practices. Their limitation of actionable retaliation only to "ultimate" decisions is, moreover, inconsistent with this Court's Title VII analysis. *See Burlington Indus, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) ("a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

decision causing a significant change in benefits.") The cramped and constricted reading of these provisions by the Fifth and Eighth Circuits simply ignores the practical realities that employees may be made to suffer substantial, direct, and immediate consequences that fall short of "ultimate employment decisions," as a result of their protest of illegal employment practices.

The record in the present case demonstrates precisely that danger. In retaliation for his opposition to Compuware's stated plan to "get rid of" the "old men" from the sales force, Compuware reassigned his sales territories, withdrew his most significant customers and contacts, and simultaneously imposed upon him a sales quota that would have been impossible to meet within the specified five week time period even if his territory had not been truncated and his customers withdrawn, upon threat of terminating his employment if that quota was not met. While none of those actions would have constituted an "ultimate employment decision," as they did not immediately result in Phillips' demotion, discharge, or reduction in compensation, the imposition of unprecedented sales quotas coupled with the simultaneous deprivation of Phillips' customer base, would inevitably have resulted in termination of his employment for failing to reach those very goals. This Court must not permit employers to engage in the subterfuge of initiating a chain of events, which will inevitably result in a change in their employees' condition of employment, merely by stopping short of the "ultimate" step in the process. Recognition of the practical reality, that employers may engage in pernicious and damaging forms of retaliatory discrimination that fall short of "ultimate employment decisions" mandates the repudiation of this restrictive standard.

Just as this Court has interpreted Title VII as protecting employees from being exposed to hostile workplace environments, *e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), even though the creation of such an environment is not an "ultimate employment decision," this Court should grant

The record in the present case demonstrates precisely that danger. In retaliation for his opposition to Compuware's stated plan to "get rid of" the "old men" from the sales force, Compuware reassigned his sales territories, withdrew his most significant customers and contacts, and simultaneously imposed upon him a sales quota that would have been impossible to meet within the specified five week time period even if his territory had not been truncated and his customers withdrawn, upon threat of terminating his employment if that quota was not met. While none of those actions would have constituted an "ultimate employment decision," as they did not immediately result in Phillips' demotion, discharge, or reduction in compensation, the imposition of unprecedented sales quotas coupled with the simultaneous deprivation of Phillips' customer base, would inevitably have resulted in termination of his employment for failing to reach those very goals. This Court must not permit employers to engage in the subterfuge of initiating a chain of events, which will inevitably result in a change in their employees' condition of employment, merely by stopping short of the "ultimate" step in the process. Recognition of the practical reality, that employers may engage in pernicious and damaging forms of retaliatory discrimination that fall short of "ultimate employment decisions" mandates the repudiation of this restrictive standard.

Just as this Court has interpreted Title VII as protecting employees from being exposed to hostile workplace environments, *e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), even though the creation of such an environment is not an "ultimate employment decision," this Court should grant Phillips' Petition and make clear that the "ultimate employment decision" restriction, which is found nowhere in the applicable statutes and is solely a judge-made limitation, *see Mattern v. Eastman Kodak Co.*, 104 F.3d at 719 (Dennis, J., dissenting) is an interpretation inconsistent with the express language of the applicable statutes and the intent of Congress in providing protection to those who oppose discrimination.

2. The Fifth Circuit's Decision Directly Conflicts With, And Analyzes Petitioner's ADEA Summary Judgment Evidence In The Manner Expressly Repudiated By, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court ruled, in the context of a Rule 50 motion for judgment as a matter of law, that a verdict for an employee in an employment discrimination case could be sustained upon a showing of a prima facie case combined with evidence that the employer's asserted justification for its action is false, despite the absence of additional, independent evidence (apart from the falsity of the employer's explanation) establishing that the "real reason" for the employer's conduct was discrimination. *Id.* at 148, 149.

In this case, the courts below held that to avoid summary judgment in an ADEA case, "[t]he plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual. Rather, a reason *cannot* be proved to be 'a pretext *for discrimination*' unless it is shown both that the reason was false, and that age discrimination was the real reason." (Memorandum and Order at 16; App. 17a) (first emphasis added; second emphasis in original). In effect, the court ruled that in order to avoid summary judgment, an employment discrimination plaintiff must always introduce "additional, independent evidence of discrimination," *Reeves*, 530 U.S. at 140, apart from a showing of a prima facie case and of the untruthfulness of the employer's explanation.

While the district court's explication of the applicable law might be comprehensible as pre-dating *Reeves*, the fifth circuit, in a decision rendered more than seven months after *Reeves* and in the face of briefs extensively discussing this Court's decision in *Reeves*, specifically adopted the lower court's ruling and commended the district court's analysis as correct (App. 1a). Thus, whatever may turn out to be the fifth

circuit's view of *Reeves* in the Rule 50 motion for judgment as a matter of law context, the ruling in this case can only be explained as either (1) adhering to a rule that (in summary judgment cases) this plaintiff must present *both* pretext *plus* independent proof of discrimination to avoid summary disposition, or (2) failing to abide *Reeves'* express mandate.

This case, then, squarely presents the questions whether the standards articulated in *Reeves* as controlling determination of the sufficiency of the evidence to sustain a jury verdict govern disposition of summary judgment motions in an employment discrimination case; and if so, whether the fifth circuit and the trial court correctly applied those standards here.

Those questions are of exceptional national importance and merit exercise of this Court's certiorari jurisdiction: not only has the fifth circuit in this case essentially rejected this Court's *Reeves* analysis in the summary judgment context,[11] other circuits have demonstrated great difficulty and substantial

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[11] Other Fifth Circuit cases suggest a degree of reluctance to accept the implications of this Court's decision in *Reeves*. In *Vadie v. Mississippi State University*, 218 F.3d (5th Cir. 2000), the Court of Appeals dismissed the *Reeves* panel opinion as an aberration inconsistent with its *en banc* decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996)(*en banc*), writing "that the Supreme Court, in deciding *Reeves*, plainly affirmed that *en banc* precedent." *Id.* *Reeves* cannot be fairly read as affirming, or, indeed, endorsing, the Fifth Circuit's reasoning in *Rhodes*. In cataloging the divergent approaches taken by the courts of appeals on the issue presented, this Court read *Rhodes* to stand for the restrictive proposition that "plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that a real reason was discrimination". 530 U.S. at 140. The fifth circuit's opinion in *Rhodes* makes clear that it applied the "pretext plus more" approach disavowed in *Reeves*, writing that the plaintiff can avoid summary judgment if the evidence "(1) creates a fact issue as to writing each of the employer's stated reasons was what actually motivated the employer *and* (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff claims." 75 F.3d at 994 (emphasis added). According to the fifth circuit, "*Rhodes* is consistent with *Reeves* and continues to be the governing standard in this Circuit." 218 F.3d at 373 n.23. That conclusion would appear to be inconsistent with this Court's reading.

inconsistency in applying the exception hypothesized by *Reeves* "where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.*

The courts' confusion in applying *Reeves* was recently explicated by the Sixth Circuit in *Wexler v. White's Fine Furniture, Inc.*, ____ F.3d ____, 2001 WL391819 (6th Cir. April 19, 2001). In affirming a summary judgment for the employer in an ADEA case, the lead opinion frequently implied terms such as "overwhelming controverted evidence" and relied upon *Reeves* for the proposition that the plaintiff is required to "disprove" the employer's proffered reason for demotion. *Id.* at *8-9. The concurring opinion in *Wexler* expresses "concern[ ] that the use of *Reeves* in this context invites misreading of that opinion, and of the burden shouldered by parties in a summary judgment proceeding." *Id.* at *10. Even though the analysis required to decide a Rule 50 motion mirrors that use in Rule 56 motion, borrowing language from *Reeves* blurs the distinction between the burden of production imposed on a plaintiff at summary judgment, and the ultimate burden of persuasion at issue in *Reeves*. *Id.* Moreover, the *Wexler* lead opinion characterized the employer's proffered non-discriminatory reason as "evidenced beyond refutation", which the concurrence recognized as implicitly calling for a weighing of evidence inappropriate to a Rule 56 proceeding. *Id.* Other courts of appeal have engaged in the same type of analysis in affirming employer summary judgments. *E.g., Slattery v. Swiss Reinsurance America Corp.*, _____ F.3d _____, 2001 WL468080 (2nd Cir. May 3, 2001); *Schnabel v. Abramson*, 232 F.3d 83 (2nd Cir. 2000); *Rowe v. Marley Co.*, 233 F.3d 825 (4th Cir. 2000).

If *Reeves* 'pretext - plus prima facie case analysis applies in the summary judgment context – and there is no principled basis for concluding that it does not, and, in fact, this Court has previously opined that standards applicable to Rule 50 motions

coincide with those governing disposition of Rule 56 motions[12] – there can be little doubt that this case contravenes *Reeves*' teachings and holding. The trial court "assumed" Petitioner had established a prima facie case (App. 18a) and, despite being asked by the Respondent to reject that finding, the fifth circuit declined to do so. The evidence of pretext was not merely incontrovertible, it was overwhelming.[13] Thus, on *Reeves*' terms, there was unquestionably sufficient evidence to sustain a jury verdict (had the case proceeded to trial and produced a verdict) *unless* either (1) plaintiff possessed the additional burden of proffering additional, independent evidence that the "real reason" for his discharge was prohibited discrimination or (2) the "no rational factfinder could conclude the action was discriminatory" standard referred to in *Reeves* was met.

Concerning the need for additional, independent evidence of discrimination (beyond evidence of a prima facie case plus pretext), *Reeves* abjures any such requirement in any but the most exceptional circumstances. Writing "separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories", Justice Ginsburg opined that it would be

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[12] *Reeves*, 530 U.S. at 150.

[13] Compuware's summary judgment evidence created an irreconcilable conflict in its explanation of the circumstances surrounding Phillips departure. On the one hand, it sought to offer three non-discriminatory, legitimate reasons why it felt compelled to terminate his employment, consistent with the recitation on the employee status change form that the termination was involuntary; yet on the other, Compuware denied that it had involuntarily terminated Phillips employment at all. Compuware simply cannot have it both ways. There is an evidentiary price to be paid for taking inherently inconsistent positions, as Compuware chose to do. By categorically denying that Phillips employment was terminated in the first instance, Compuware's subsequent attempt to explain that termination on neutral grounds is inherently inconsistent and, therefore, "unworthy of credence." *Reeves*, 530 U.S. at 147.

"uncommon" and "atypical" for a conclusive demonstration to be made that discrimination could not have been the employer's true motivation in light of evidence of the employer's dishonesty. 530 U.S. at 154-55 (Ginsburg, J, concurring). Except in those rare circumstances, "the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above." *Id.* If *Reeves* controls summary judgment cases, the fifth circuit's endorsement of the district court's holding that an employment discrimination plaintiff "cannot" avoid summary judgment without evidence of *both* pretext *and* discrimination as the "real reason" for the action, (App. 17a), conflicts directly and irreconcilably with *Reeves* and cannot be sustained.

Regarding the "no rational factfinder" standard, it is clear that indulging the presumptions in favor of non-movants in summary judgment cases, Petitioner has more than satisfied that standard here. The evidence that a company official reported to Petitioner that the company had adopted a plan to "get rid of the old guys" is certainly sufficient to permit a jury to conclude that is the reason Petitioner was fired (especially when coupled with the company's mendacity in claiming that Petitioner had "resigned" as the explanation why his employment terminated, and its hostility to his protests of the company's apparently illegal policy). While a jury would not be compelled to conclude that the "real reason" for Petitioner's involuntary termination was illicit discrimination (and/or retaliation), it would not be irrational for it so to infer.

Surely this is not a case in which "the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision," or where the Petitioner's case of "pretext" was weak and "there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148. On the contrary, no non-discriminatory (and non-retaliatory) reason for the employer's firing of Petitioner is *conclusively* established by this record. Most

significantly, company officials repeatedly denied under oath that Petitioner had been terminated for any such reasons, and other evidence adequately (for summary judgment purposes) contradicted any such suggestion, at all events. And rather than "abundant and uncontroverted evidence" that no discrimination (or retaliation) had occurred, there was undisputed evidence that Petitioner had been told that the company had decided to "get rid of the old guys"[14] and its treatment of him on account of his complaints of age discrimination may well betray a corporate guilty conscience.

The courts below, and the other courts of appeals that have so readily affirmed post-*Reeves*' summary judgments in ADEA cases, have failed to comply with this Court's reiteration in *Reeves* of the applicable evidentiary prism through which a plaintiff's evidence must be viewed: the court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence. *Reeves*, 530 U.S. at 150. In their post-*Reeves*' decisions, the courts of appeal have given little credence to this Court's direction that, in reviewing the record as a whole, they must disregard all evidence favorable to the moving party that the jury is not required to believe, *Id.*, or stated another way, "the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is *uncontradicted* and *unimpeached*, at least to the extent that that evidence comes from *disinterested witnesses*.'"

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[14] Certainly, as Respondent argued in the courts below, the "old guys" comment *might* be interpreted to refer only to the prior regime of salespersons, regardless of age, rather than to acknowledge a company plan to "green" its sales force by eliminating older employees. But it is the jury - not the court on summary judgment - which has exclusive province to chose between competing inferences which can be drawn from undisputed facts. *Hunt v. Cromartie*, 526 U.S. at 552. At all events, it would not be irrational for the jury to conclude that the "old guys" comment exposed a discriminatory intent, even if the company could suggest an alternative interpretation of the statement.

Id. at 151 (emphasis added). The defendant employer's explanations offered to explain its action on a non-discriminatory basis are, inherently and self-evidently, from a keenly interested witness. *Reeves* teaches that the mere demonstration of the falsity of that explanation inherently contradicts and impeaches the explanation as being unworthy of credence.

The Court should grant certiorari to consider the applicability of *Reeves* to summary judgment cases and to correct the fifth circuit's manifest disregard of this Court's *Reeves* decision and its return to pre-*Reeves* jurisprudence, at least in summary judgment cases.

CONCLUSION

In conclusion, for the reasons stated above, petitioner requests that this Court issue a writ a certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20266

JERRY A. PHILLIPS,

Plaintiff-Appellant,

versus

COMPUWARE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-98-CV-2848

Before POLITZ, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Jerry A. Phillips appeals an adverse summary judgment in his action asserting, inter alia, ADEA claims against Compuware Corporation. Our review and consideration of the record on appeal, briefs, oral arguments

of counsel, and prevailing law persuades that the district court did not err in its rendition of the challenged ruling. Accordingly, on the facts as detailed, authorities cited, and analysis made by the trial court in its thorough, comprehensive, and scholarly Memorandum and Order signed February 17,2000 and entered of record on February 22, 2000, the judgment appealed herein is AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FEB 22 2000

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISON

No. 98-2848

JERRY A. PHILLIPS,

Plaintiff,

versus

COMPUWARE CORPORATION,

Defendant.

MEMORANDUM AND ORDER

Pending before the Court is Defendant Compuware Corporation's motion for summary judgment (Dkt. # 20). After considering the motion, the response filed by Plaintiff Jerry Phillips, the record and the applicable law, the Court is of the opinion that the motion for summary judgment should be GRANTED. Compuware's motion to strike certain evidence (Dkt # 40) is DENIED; however, the Court has taken note of Compuware's evidentiary objections and has considered only admissible evidence in making its summary

judgment ruling.

I. Factual and Procedural Background

Compuware hired Phillips in July 1996 to be a salesman for its Uniface software product. Phillips was 39 years and four months of age when he began his employment with Compuware. Phillips alleges that during pre-offer negotiations he was orally promised by Pete Karmanos, Compuware chairman and CEO, that he would be employed by Compuware long enough for his stock options to vest (three to five years), provided he did his job and did not "misbehave." Phillips also claims that Rick Schroeder, Compuware's national director of Uniface sales, promised Phillips during pre-employment negotiations that he would be assigned certain target accounts for a 24-month period. Compuware made an offer of employment to Phillips by letter dated June 25, 1996 from Joseph Nathan, Compuware president and chief operating officer. Attached to the offer letter was a "list of Target Accounts" which were to be assigned to Phillips for his "first twelve (12) months with Compuware." The offer letter also stated that "Account assignments are dynamic and we anticipate changes to your Target Accounts over time." The offer letter also provided that 20,000 shares of stock options would vest 50 percent after three years of employment, 25 percent after four years, and 25 percent after five years. Phillips testified that he read the letter and signed it knowing its terms. Phillips testified that he asked Schroeder to change the offer letter to provide that he would be assigned the accounts for 24 months, and Schroeder replied that the letter would not be changed but that Phillips had Schroeder's promise that the accounts would be assigned to him for 24 months.

On July 8, 1996, Phillips signed Compuware's employee agreement, which provided that "Compuware retains its right to terminate [Phillips'] employment, with or without cause, and with or without notice, at any time." The

employment agreement also stated that its terms would "supersede any and all contrary terms and conditions of employment that may have been in existence prior to the execution of this agreement and that the employment agreement 'can be modified only by written agreement between the employee and the director of personnel." On July 16, 1996, Phillips signed the "Compuware Corporation SSD-P Sales Compensation Plan, Uniface Sales Executives," which listed his assigned target accounts and set the annual sales quota at $1.5 million, with the quota for each quarter being $375,000. Phillips testified that he agreed to the sales quota and understood it to be a part of his agreement with Compuware. On October 10, 1996, Phillips signed a stock option agreement, which provided that the options did not begin to vest until July 8, 1999, three years from his start date. The stock option agreement provided that if Phillips' employment were to be terminated without cause, he would have 30 days to exercise any stock options that had already vested at the time of his termination, but if his employment was terminated with cause, he would lose any right to vested stock options, The stock option agreement provided that "Nothing contained in this Agreement or in the Plan, nor any action taken by the Corporation, shall confer upon you any right with respect to continuation of your employment by the Corporation." Attached to the stock option agreement was the stock option plan, which stated that "Nothing contained in the Plan or in any stock option granted or awarded pursuant to the Plan . . . shall confer upon any Participant any right with respect to continuation of employment by the Corporation.. . as an employee nor interfere in any way with the right of the Corporation . . . to terminate such person's employment as an employee at any time with or without cause." Phillips testified that he understood that the options would not begin to vest until he had been employed for three years, and would not fully vest for five years, but he claims that the vesting period was "just a formality" based upon the alleged oral promise of Karmanos that Phillips should not worry because

he was an excellent salesman and would be at Compuware for the five years.

Phillips testified that he understood that the written documents -- the offer letter, employee agreement, sign-up bonus, sales compensation plan and stock option documents -- reflected the "final deal" between him and Compuware. He testified that he signed each document after reading it and understanding its terms.

On March 19, 1997, Alan Cantrell, vice president of Compuware's Enterprise Solutions Division, told Phillips that Compuware was concerned about Phillips' poor sales performance and inaccurate sales forecasts, and offered suggestions for improvement. At this time, Cantrell was Phillips' regional manager, and Richard Larrabee was Phillips' direct manager.

Cantrell also told Phillips in March 1997 that Phillips was "spread too thin" and that some of Phillips' Dallas accounts would be reassigned in fiscal year 1998 to allow Phillips to concentrate his efforts on other potential Uniface customers who Phillips had identified as his strongest prospects. Cantrell testified in his affidavit that he conducted about a dozen weekly phone status conferences or performance reviews with each of the Uniface sales representatives in his region, including Phillips. in April, May, June and July 1997. During each of these reviews, Cantrell discussed Phillips' performance problems with him.

On June 19, 1997, Cantrell sent all of the Uniface sales representatives, including Phillips, the fiscal year 1998 compensation plan ("FY98 Comp Plan") with instructions to sign it and return it to Cantrell by June 27, 1997. The plan listed an annual sales quota of $1,500,000 for all Uniface sales representatives. The "designated accounts/territory" list attached to the FY98 Comp Plan indicated that five of

Phillips' accounts, three in Dallas and two in Memphis, Tennessee, would be taken away from Phillips in June 1997.fn1

On July 2, 1997, as part of a quarterly review held with each individual Uniface sales representative, Phillips' performance was reviewed by his direct manager, Larrabee, and his regional manager, Cantrell. The review was conducted by telephone conference. During this conversation, Phillips alleges that Cantrell made the comment, "we're going to get rid of the old guys," or "we're going to get rid of the old men." Phillips testified that the comment was made during a discussion about the fact that Cantrell's region "wasn't doing well, that [the sales representatives] weren't up to speed, that they all were on the hot seat and that we needed to get numbers in." Phillips also testified that Cantrell said "it was up to Jack [Shevillo, senior vice president of Enterprise Solutions] and [Cantrell] to get this thing rolling and that we needed to get revenue in. . . . [W]e talked about [various problems with the Uniface product]. . . . And [Cantrell] said 'Well, I don't want to hear any of that stuff. We need to get sales results." Phillips testified that he understood from the conversation that Cantrell perceived a problem that the "old guys" weren't working or generating high enough sales, (Phillips disagreed with this perception) and that Cantrell was thinking about having to replace his existing sales force with a new sales force,fn2 In a recorded telephone conversation, Phillips told another Uniface sales rep, Richard Birkenbeuel, that be understood that Cantrell's motivation in canceling an August 1997 seminar "was that since all of us old men here weren't doing any work or we weren't selling anything, that be felt that he was just going to cancel and get rid of us anyway."

Phillips contends that the "old guys" or "old men" comment by Cantrell is direct evidence of a company-wide plot to get rid of all the older Uniface sales representatives

before their lucrative stock options could vest, and replace them with younger employees. At the time the alleged comment was made on July 2, 1997, Phillips was 40 years and 4 months of age, and the speaker, Cantrell, was 40 years and 11 months of age. Phillips' direct manager at the time, Larrabee, who was also present during the "old guys" comment, was 36 years old.

On July 8, 1997, Phillips had been employed by Compuware for one year. He had received $325,000 in compensation, but had obtained only $2,000 in sales.fn3 Also in July 1997, there was a change in the organizational structure of the Uniface division of Compuware, and as a result, both Larrabee and Phillips began to report directly to Jack Shevillo, senior vice president of Enterprise Solutions, Therefore, Phillips no longer reported to Cantrell. Phillips' next performance review was conducted on July 28, 1997 by Larrabee and Shevillo, who at the time was 61 years old. Again, Phillips' performance problems were discussed, along with a plan of action to improve Phillips performance and make him successful, Phillips contends that he complained about Cantrell's "old guys" comment to Larrabee and Shevillo at this meeting,fn4 but that nothing was done about it. On August 9, 1997, Phillips formally requested a transfer to Compuware's Dallas office. Phillips testified in his affidavit that he and Larrabee had previously discussed the Dallas transfer in July 1997. Also in August 1997, Larrabee and Shevillo decided to put Phillips on a written plan in an effort to get his sales on track with his forecasts of business, Larrabee drafted the written Sales Action Plan on August 12, 1997, and the plan was hand-delivered to Phillips. The plan called for Phillips' signature and agreement, and stated that "It is understood that failure to demonstrate significant improvement by the end of this [90-day] time period will result in further corrective action up to and including termination of employment." Both Cantrell and Shevillo testified that Cantrell did not take part in the decision to put

Phillips on a written sales plan. The summary judgment evidence shows that two other Uniface sales representatives, in addition to Phillips, were put on written sales plans in 1997 due to poor sales, including Jeff Groch, who was 41 when first placed on the written plan, and Doug Clark, who was 36 when first placed on the written plan. In 1998, four Uniface sales representatives were placed on written plans, including Groch, then 42, Ken Matsagas, 53, Donald Prince, 59, and Terry Ramsay, 46.

Although Phillips had been instructed to sign and return the FY98 Comp Plan by June 27, 1997, he had not yet signed it by the beginning of September 1997, and he also had not signed the August 12, 1997 Sales Action Plan. On September 5, 1997, Phillips wrote a letter to Joseph Nathan, age 44, Compuware president and chief operating officer, complaining that the performance expectations set out in the FY98 Comp Plan and his Sales Action plan were unfair and "obviously impossible" to achieve, in light of the Uniface product's poor performance in general. "Recently, I was told that all of you old guys will be terminated," Phillips wrote. "Indeed, it appears that most of the highly qualified Uniface sales executives either have been are in the process of being terminated." Phillips complained about being threatened with termination for failing to achieve these impossible goals, asked for a "reasonable severance package" in the event Compuware decided to terminate his employment, and concluded that 'it would be very unfair to take away the options I have, simply because the product was wrongfully presented and positioned,"

On September 9, 1997, Shevillo and Larrabee had a phone conference with Phillips to discuss his allegations of age discrimination and whether he was willing to stay with Compuware and move forward to close business, The conversation was tape-recorded by Phillips. The transcript of the phone conference reflects that Shevillo remained excited

about the Uniface product and repeatedly urged Phillips to stay with Compuware and be successful. Phillips, however, expressed concerns with what he saw as numerous problems with the Uniface product, and expressed how offended and angered he was by Cantrell's "old guys" comment. Phillips said he and the other Uniface sales reps were apparently "the guinea pig guys," because Compuware was "going to take us out and basically bring other people in and try to make this thing go." Shevillo said that perception was "totally incorrect," and pointed out that only two Uniface sales reps had been terminated, one for poor performance, and the other because he "decided that the business was not for him." Shevillo pointed out the fact that he himself was 61 years old and would not tolerate age discrimination, and promised that "we'll get to the bottom of the Alan thing," but reminded Phillips that he no longer had to report to Cantrell, and suggested that Phillips "put all this stuff behind you," and concentrate on being successful and making sales. Shevillo told Phillips that no one at Compuware wanted to fire him; on the contrary, they wanted him to stay and commit to closing business, Phillips, however, stated repeatedly that he did not feel that the Uniface product was going to be successful, and he repeatedly stated that he wanted to receive a "reasonable severance package" in exchange for his resignation. "I've come to the conclusion that it's better for both Compuware and for Jerry Phillips if we would come to some kind of mutual agreement here on a severance package and the options to make sure, you know, that everybody is happy," Phillips said. Shevillo again urged Phillips to reconsider, and said Compuware was willing to give Phillips "some more draw" if needed to support his family until sales picked up. Phillips ended the conversation saying that he would "think about it." On September 12, 1997, Nathan sent Phillips a letter stating that although Compuware considered his allegations to be of a serious nature, Nathan had investigated and found the allegations to be "untrue." Nathan wrote that Compuware wanted Phillips to be successful and

to meet the goals set out by his manager.

During September and into October 1997, several letters were exchanged between Phillip's attorney, John O'Neill, and Compuware's general counsel, Tom Costello, regarding Phillips' allegations of age discrimination and Compuware's investigation. Meanwhile, Phillips' relationship with Compuware continued to deteriorate. Phillips and Larrabee exchanged correspondence in early October regarding Phillips' continuing anger at Cantrell's "old guys" comment, at having some of his accounts reassigned, and at being put on the Sales Action Plan. In an October 7, 1997 memo written as part of a performance review, Phillips stated his opinion that Compuware was setting him up to fail by taking some of his accounts away after having promised him he could keep those accounts for two years, and that he considered the account reassignment to be retaliation for his September 5, 1997 letter accusing Compuware of age discrimination. Phillips also stated that the quotas and goals set by Compuware were "impossible" to meet, pointing out that only two sales reps reached their quota in fiscal year 1997. Phillips contended that he bad been singled out to be placed on a Sales Action Plan as part of a "scheme to make me lose my stock options." In an October 16, 1997 letter to Phillips, Larrabee pointed out that Phillips' offer letter guaranteed his account assignments for only 12 months, and reminded him that the reassignment of the accounts had been discussed with him as far back as March 1997, long before he made complaints about the "old guys" comment. Larrabee acknowledged that only two sales reps had made quota, but stated that Compuware was willing to work with all its sales reps, including Phillips, to improve their performance, and asserted that it was Phillips' "failure to make any effort toward improving your performance and your attitude towards the product that present a problem, not your failure to make your quota. . . . You have not been discriminated against. If anything, your non-performance and

insubordination have been overlooked in an effort to salvage a relationship in which Compuware has invested a great deal (in terms of both time and money).' Larrabee concluded as follows:

> Jerry, your performance and attitude are wholly unacceptable. . . You have stated that you do not intend to quit even though you have failed to sign your Fiscal 1998 Compensation Plan, failed to sign your Sales Action Plan, failed to cooperate in the implementation of a plan which will result in achievement of your sales quota and failed to meet your sales quota. You are in breach of your Employment Agreement with Compuware and you leave Compuware with no choice but to accept your resignation (or terminate your employment) if you do not, within the next 7 days, (i) sign your Fiscal 1998 Compensation Plan, (ii) sign your Sales Action Plan, (iii) cooperate in the implementation of a plan which will result in achievement of your annual sales quota, and (iv) demonstrate a good faith effort and reasonable progress toward attainment of your Sales Action Plan goals. I look forward to receipt of your executed Compensation Plan and Sales Action Plan or your resignation by Friday, October 24, 1997. If I do not receive executed copies or your resignation, your employment with Compuware will be terminated as of that date.

By letter dated October 20, 1997, Phillips' attorney returned the Compensation Plan and Sales Action Plan, both signed by Phillips with a handwritten notation that "the goals in this plan are not realistically achievable. I do not agree that

Compuware has no obligations as stated herein. On October 24, 1997, assuming that he had been fired, Phillips turned in his keys and company property, and sent an email to Compuware human resources, copied to Larrabee, which stated that "I have been involuntarily terminated today." Larrabee responded by email on October 26, 1997, telling Phillips that he had not been terminated, because he had signed his Sales Plan and Compensation Plan, as requested in the October 16 letter. "We need to discuss your third quarter objectives if you are still willing to work and try [to] close business," Larrabee wrote. "If not, I guess you have resigned!" On October 27, 1997, Phillips wrote a letter to Larrabee that he had not resigned, but "[i]f Compuware has in fact changed its mind and desires to rescind its termination of me [as] illegal or wrong, please tell me in writing," A letter also dated October 27 from Phillips to Larrabee states that "Despite the embarrassment to me caused by your terminating me . . . and then reinstating me, I am happy to resume work on the understanding that Compuware realizes that it did not act properly." On October 30, 1997, Larrabee responded by letter stating that in Compuware's view, Phillips by his actions had made a choice to resign by adding unacceptable language to his Sales Plan and Compensation Plan and by turning in his keys and company property. "Given your obvious lack of motivation and discontent with Compuware, I feel certain that continued employment with Compuware serves no purpose," Larrabee wrote. "Consequently, Compuware does not wish to reinstate you, for any reason." On October 31, 1997, Phillips wrote to Larrabee that be considered himself to have been fired because be "would not leave voluntarily" Phillips wrote that he was pursuing an EEOC complaint and "I believe you fired me for that reason. . . . I'm going to make you pay for every cent you are stealing of my options." An "Employee Status Change Form" signed by Larrabee on October 31, 1997 has a box checked indicating that Phillips' termination of employment was "involuntary," although Compuware points

out that Larrabee did not have the authority to fire Phillips without a signature from Shevillo and approval from the human resources department, neither of which was obtained.

Phillips filed an EEOC charge on December 1, 1997 alleging age discrimination and retaliation. He filed this action in state court in July 1998, alleging: (1) age discrimination and retaliation under the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. and the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 2 1.001 et seq.; (2) securities fraud in violation of the federal Securities Acts of 1933 and 1934, 15 U.S.C. § 77 et seq. and the Texas Blue-Sky Laws, TEX. BUS. & COM. CODE § 27.01 and TEX. REV. CIV. STAT. ANN. ART. 581-33 et seq.; (3) common law fraud; (4) breach of contract; and (5) promissory estoppel/estoppel in pais.

Compuware removed the case to this Court and now seeks summary judgment on all of Phillips' claims.

II. Summary Judgment Standard

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). The movant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant who is a defendant may discharge its burden by pointing out an absence of proof on any one of the essential elements of the plaintiffs claim. Celotex, 477 U.S. at

325. Once the movant has done so, the burden shifts to the nonmovant to designate specific facts showing that summary judgment should not be granted. Id. at 321-25; Wallace v. Texas Tech. Univ., 80 F. 3d 1042, 1047 (5th Cir. 1996). When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in favor of the nonmovant. See Samuel v. Holmes, 138 F.3d 173, 176 (5th Cir. 1998); Texas v. Thompson, 70 F.3d 390, 392 (5th Cir. 1995). The nonmovant does not satisfy his burden with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla of evidence." Little, 37 F.3d at 1075. Only a genuine dispute over a material fact one capable of affecting the outcome under existing law will preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Hanchey v. Energas Co., 925 F.2d 96, 97 (5th Cir. 1990) (fact issue must be "outcome determinative").

III. Discussion

As an initial matter the Court must determine which state's law will apply. The July 1996 "Employee Agreement" provides that "[t]his Agreement shall be governed by the laws of the State of Michigan." This Court, sitting in diversity in the state of Texas, must apply the choice of law principles of the fomm state, see Caton v. Leach, 896 F.2d 939, 942 (5th Cir. 1990). "Texas recognizes the right of contracting parties to agree to choice of law." Tel-Phonic Services, Inc. v. TBS International, Inc., 975 F.2d 1134, 1142 (5th Cir. 1992). Phillips and Compuware contractually agreed that Michigan law would govern Phillips' employment agreement, and neither party disputes the enforceability of that provision. The Court finds no reason not to enforce the parties' choice of law. Michigan law should also apply to the fraud and promissory estoppel claims because they are based

on the parties' contractual relationship as well. See Tel-Phonic Services, in which the Fifth Circuit held: "As to the fraud claim, we believe that the Texas Supreme Court would follow the conflicts principle that the effect of a misrepresentation or undue influence upon a contract is governed by the same law that governs the contract." Tel-Phonic Services, 975 F.2d at 1142 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 201). "Questions involving the effect of misrepresentation, duress, undue influence and mistake upon a contract are determined by the law chosen by the parties, if they have made an effective choice." Id (also applying contractual choice of law clause to breach of fiduciary duty claim). Therefore, the Court concludes that Michigan law shall apply to Phillips' fraud, breach of contract and promissory estoppel claims.fn5 In any case, the parties agree that Texas and Michigan law on the issues in dispute in this case are generally the same, and this order will cite cases from both states.

A. Age Discrimination Claim

The Age Discrimination in Employment Act ("ADEA") protects employees who are 40 years of age or older, and forbids employers to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C.A. § 623(a)(1) (West 1999). The legal standards applicable to age discrimination cases contain well-established shifting burdens of production and proof. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas framework, a plaintiff must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (en banc). To establish a prima facie case of age discrimination, the

plaintiff must show that he was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of his discharge (here, employees more than 40 years of age); and (4) either (i) replaced by someone outside the protected class, (ii) replaced by someone in the protected class but younger than the plaintiff; or (iii) otherwise discharged because of his age. See Reeves v. Sanderson Plumbing Products, Inc., 197 F3d 688, 692 n. 11(5th Cir.), cert. granted, 120 S. Ct. 444 (1999); see also Bodenheimer v. PPG Indus. Inc., 5 F. 3d 955, 957 (5th Cir. 1993).

If the plaintiff successfully establishes his prima facie case, he raises an inference of unlawful discrimination. Rhodes, 75 F.3d at 992. The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its treatment of the plaintiff. Id. at 992-93. The employer is not required to prove, but need only articulate, the legitimate, non-discriminatory reason for the decision. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259-60 (1981). After the defendant articulates a legitimate reason for the challenged conduct, any inference raised by the plaintiffs prima facie case drops from the case, and the focus shifts to the ultimate question of whether the defendant intentionally discriminated against the plaintiff. Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 140 (5th Cir. 1996). At this point, the plaintiff must prove "at a new level of specificity' that the employer's reasons are not true reasons but only pretexts for illegal age discrimination. Waggoner v. City of Garland, 987 F.2d 1160, 1164 (5th Cir. 1993). To avoid summary judgment, then, a plaintiff must produce evidence creating (1) a fact issue regarding whether each of the employer's stated reasons for the employment decision was what actually motivated the employer, and (2) a reasonable inference that the protected characteristic (here, age) was a determinative factor in the actions of which the plaintiff complains. See Walton v. Bisco Indus., Inc., 119 F.3d 368, 370-71 & n.3 (5th Cir. 1997). The

plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual. Rather, a reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false, and that age discrimination was the real reason. Id. at 370 (quoting St. Mary's Honor Ctr., 509 U.S. at 515); see also Rhodes, 75 F.3d at 994 (plaintiff's summary judgment evidence must allow a factfinder to "reject the defendant's reasons and infer discrimination).

Compuware and Phillips devote much briefing to the issue of whether Phillips has established a prima facie case on his age discrimination claim. For example, Compuware insists that Phillips did not suffer an adverse employment action because he resigned voluntarily, and Phillips insists that he was involuntarily terminated. Viewing the evidence in the light most favorable to Phillips, the Court will assume for the purpose of summary judgment that Phillips was constructively discharged.fn6 However, the prima facie case analysis merely determines whether the employer will be required to articulate a legitimate nondiscriminatory reason for the challenged conduct. See, e.g., Grimes, 102 F.3d at 140-43. Assuming, arguendo, that Phillips has made a prima facie showing of discrimination based upon age, Compuware has articulated reasons for all of the conduct that Phillips challenges in this lawsuit. Compuware has introduced evidence showing that Phillips' sales were poor, that he had a negative attitude toward the Uniface product he was hired to sell, and that he insubordinately refused to sign his Sales Action Plan and FY98 Comp Plan. If believed, these reasons are legitimate and would support a finding that Compuware did not engage in age discrimination. Thus, any inference raised by a prima facie case has dissolved, and the Court must now determine whether Phillips has offered evidence such as to allow a rational factfinder to make a reasonable inference that age was a determinative reason for any of the conduct by Compuware of which Phillips complains. See St.

Mary's Honor Ctr., 509 U.S. at 515; Rhodes, 75 F.3d at 994; Walton, 119 F.3d at 370-71 & n.3.

Phillips, of course, points to Cantrell's July 2, 1997 "old guys' comment as evidence that Compuware's treatment of him was motivated by age discrimination. Age-related remarks may be evidence of age discrimination if the remarks are (1) age-related; (2) proximate in time to the adverse employment decision; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. See Haas v. Advo Systems, Inc., 168 F.3d 732, 733 (5th Cu. 1999); Brown v. CSC Logic, Inc., 82 F.3d 651, 655-56 (5th Cir. 1996). The Court observes that the evidence in the record, including Phillips' testimony of the context of the remark, points to the conclusion that Cantrell -- who was the same age as Phillips, 40, when he made the comment -- was simply stating that if the existing sales force failed to perform, Compuware would "get rid of the old guys," meaning the existing sales force, and hire new sales representatives.fn7 Additionally, the comment appears to be a general statement not specifically directed at Phillips. However, even if a reasonable jury could conclude that Cantrell was referring to chronological age when he used the word "old," the Court cannot conclude that Phillips has raised a genuine issue of material fact as to whether his constructive discharge more than three months later was motivated by age discrimination. First, the record is clear that Cantrell, who made the "old guys" comment, was no longer Phillips' manager after mid-July 1997. Cantrell took no part in the decision to place Phillips on a written Sales Action Plan, and Cantrell took no part in the decision to threaten Phillips with termination in October 1997 for his refusal to sign the FY98 Comp Plan and the Sales Action Plan. One of the managers who made the disciplinary decisions in October 1997, Shevillo, was 61 years old. See Brown, 82 F.3d at 658 (holding that when the decisionmaker "is also a member of the protected class" an

inference arises that the challenged decision was not age-related). Larrabee, who wrote the October 16, 1997 letter threatening Phillips with termination, was 36 years old at the time, only four years younger than the 40-year-old Phillips. Nathan, who investigated Phillips' complaints of age discrimination and "unfair treatment" and found them to be baseless, was 44 years old. See Reeves, 197 F.3d at 691-93 (holding that comment that plaintiff was "too damn old to do the job" was not sufficient to support verdict for plaintiff despite its "potentially danming nature,' because "it is clear that these comments were not made in the direct context of [the plaintiff] 's termination," and the speaker was just one of several decision makers, some of whom were over the age of 50).

In addition, Phillips was not replaced by someone outside the protected class, or even by an individual younger than him. Karl Antilla, who was hired on October 1, 1997 as a sales representative for Compuware's Dallas office, and who was assigned some of Phillips' accounts, was 43 years old. The sales representative hired on January 19, 1998 to replace Phillips in Houston was Tom Lindsey, age 41. In fact, the record shows that between September 1, 1997 and October 5, 1998, (approximately the one-year period after Phillips's employment with Compuware ended), Compuware hired six new Uniface sales representatives. Five of them were older than Phillips, and the sixth was born just 24 days before Phillips.fn8 These five individuals -- aged 40 to 53 -- were hired to replace Phillips and four other Uniface sales representatives who also ranged in age from 40 to 53 on their dates of termination.

These numbers do not indicate age discrimination. Furthermore, Phillips has introduced no evidence tending to show that younger Uniface sales reps were given lower quotas, or were not put on sales action plans. In fact, the evidence is to the contrary. Compuware has introduced

evidence that the sales quotas were the same for all of the Uniface sales force, and the FY98 Comp Plan that the Uniface sales representatives were asked to sign was the same for all. Two other sales representatives, one of whom was 36 years old, were placed on written sales action plans in 1997 due to poor sales. Phillips has not contradicted Compuware's evidence that no other Uniface sales representative, young or old, failed or refused to unconditionally agree to their compensation plans and sales action plans. Phillips' contentions that the Uniface product was flawed, that the sales representatives were treated unfairly, or that Compuware's sales expectations were unreasonably high -- even if true -- do not prove that Compuware engaged in age discrimination. See Ross v. University of Texas at San Antonio, 139 F.3d 521, 527 (5th Cir. 1998) (holding that "[t] ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it intended to transform the courts into personnel managers. ") (quoting Waggoner v. City of Garland, 987 F.2d 1160, 1165 (5th Cir. 1993)).

After thoroughly and carefully reviewing the entire record, including the various attached deposition excerpts and affidavits and other documents, this Court concludes that Phillips has failed to offer summary judgment evidence which would allow a reasonable trier of fact to conclude that Compuware's explanations for the conduct at issue here were merely pretexts for age discrimination. See EEOC v. Texas instruments, inc., 100 F. 3d 1173, 1181 (5th Cir. 1996) (personnel director's age-related comment could not show pretext because the personnel director did not make the challenged employment decision); Reeves, 197 F. 3d at 694 (noting that because a 35-year-old employee was disciplined for the same conduct as the 57-year-old plaintiff, the plaintiff had not shown unequal treatment due to age); Ross, 139 F.3d at 526 (holding that employer's favorable treatment of other over-50 employees tended to negate any inference of age

discrimination against the plaintiff).

The Court concludes for the above reasons that Phillips has failed to raise a genuine issue of material fact regarding any age-based discriminatory intent on the part of Compuware, and therefore concludes that summary judgment is proper on Phillips' ADEA discrimination claim.

B. ADEA retaliation claim

The ADEA also makes it unlawful for an employer to discriminate against any of its employees "because such individual . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C.A. § 623(d) (West 1999). A plaintiff establishes a prima facie case of retaliation under the ADEA by showing: (1) that he engaged in activity protected by the ADEA; (2) that there was an adverse employment action; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Holt v. JTM industries, Inc., 89 F.3d 1224, 1225-26 (5th Cir. 1996), cert. denied, 520 U.S. 1229 (1997). Once the prima facie case is established, the burden of producing some non-discriminatory reason for the discharge falls upon the defendant. Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 267 (5th Cir. 1994), If the defendant demonstrates such, the employee then assumes the burden of showing that the reasons given by the defendant were a pretext for retaliation. Id. The ultimate determination in a retaliation case is whether, "but for' the protected conduct, the employer would not have engaged in the adverse employment action. See Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 372 (5th Cir. 1998), cert denied, 119 S. Ct. 798 (1999) (holding that protected activity "fall[s] into two broad categories -- opposition and participation"). Because Phillips

did not file his EEOC charge until after his employment ended, his retaliation claim rests upon the "opposition" clause rather than the "participation" clause.

Phillips alleges that, in retaliation for his complaints about the "old guys" comment, during July, August, September and October 1997, Compuware denied his request for a transfer to Dallas, subjected him to unrealistic and "impossible" sales targets, placed him on a written sales action plan, reassigned some of his accounts, and terminated his employment. The Court initially notes that the ADEA retaliation provision does not apply to the denial of Phillips' transfer request, the account reassignment, the sales action plan and the high sales quotas. The Fifth Circuit has repeatedly held that federal employment discrimination statutes such as the ADEA and Title VII were "designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." See, e.g., Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir.), cert. denied, 522 U.S. 932 (1997). "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating." Id. at 339 (noting that a verbal threat of termination, a reprimand, placing an employee on "final warning," giving an employee false information, criticizing the employee's work, and criticizing an employee's EEOC complaint are not ultimate employment decisions); see also Messer v. Meno, 130 F.3d 130, 139-40 (5th Cir. 1997) (holding that employer's actions -- including failure to resolve employee's internal grievance and criticism of her work and conduct -- were not ultimate employment decisions), cert. denied, 119 S. Ct. 794 (1999). The record shows that the requested transfer to Dallas would have been a purely lateral transfer; Phillips' title and pay would have remained the same. In fact, the individual who received the Dallas position instead of Phillips was actually paid less than Phillips. Denial of an employee's request for a

lateral transfer to another location is not an ultimate employment decision actionable as retaliation. See Burger v. Central Apartment Mgt., 168 F.3d 875, 879 (5th Cir. 1999) (affirming judgment n.o.v. for defendant employer when plaintiff claimed that the employer's denial of his request to transfer to another office was retaliatory; also noting that if an employer's imposition or denial of lateral transfers were actionable as retaliation, "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit") (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cit. 1996)).

Under these authorities, the actions of Compuware that Phillips claims were retaliatory are only actionable as retaliation to the extent they can be characterized as a constructive discharge. Furthermore, the Court concludes that Phillips has not raised a genuine issue of material fact that "but for" his complaints of age discrimination, Compuware would not have denied his transfer request, reassigned his accounts, placed him on a sales action plan, set unreasonably high quotas, and constructively discharged him. First, the evidence shows that Compuware discussed Phillips' performance problems and inaccurate sales forecasts with him as early as March 1997, long before Phillips complained of age discrimination. Reassignment of certain of Phillips accounts was discussed in March 1997, and was set out in the FY98 Comp Plan delivered to Phillips on June 19, 1997. Even after Phillips began to complain about the "old guys" comment, be was repeatedly told that no one at Compuware wanted to fire him; rather, his managers tried to persuade him not to leave. The evidence shows that other sales representatives -- who did not complain of discrimination -- were also placed on sales action plans or were terminated for poor sales performance in 1997. The "impossible" sales quotas given to Phillips were given to all of the Uniface sales representatives in the FY98 Comp Plan, but Phillips was the

only one who refused to sign and return the plan. For these reasons, the Court concludes that Phillips has not raised a genuine issue of material fact on his ADEA retaliation claim, and Compuware's motion for summary judgment is GRANTED as to the retaliation claim.

C. Breach of Contract

Phillips alleges in his original petition that Compuware "breached its stock option agreement," and that "Compuware breached provisions in the agreement wherein it promised stock options to Mr. Phillips, and wherein it agreed not to withhold these options from Mr. Phillips except for good cause." Phillips contends that Compuware breached a contract with him "by failing to honor the options and by creating in bad faith the 'resignation' pretext for its refusal to honor the options."

The "Nonqualified Stock Option Agreement" document that Phillips signed on October 10, 1996 provides that Phillips' stock options would not begin to vest until July 8, 1999, three years from his employment start date.fn9 The stock option agreement contains provisions regarding the consequences of discharge with and without cause after the option vesting date, but it makes clear that in no case could Phillips exercise any stock option before his third anniversary of employment. The "1996 Stock Option Plan" provided that "stock options may be exercised only while the Participant is an employee." Thus, Compuware's agreement to grant stock options to Phillips was contingent upon him remaining a Compuware employee for three years. If his employment ended, for any reason, before July 8, 1999, Phillips would have no right to exercise any stock options.fn10 Furthermore, the stock option agreement signed by Phillips provided that "[n]othing contained in this Agreement, or in the [stock option] Plan, nor any action taken by the Corporation, shall confer on you any right with respect to continuation of your employment by

the Corporation or any subsidiary of the Corporation." It is clear from Phillips' deposition testimony that he understood these conditions. Phillips testified that "right from the beginning" of his pre-employment negotiations with Compuware, all of the company representatives he spoke to, including George Moilanen, vice president of recruiting, told him that the stock options would not begin to vest for three years. Phillips testified that in a June 1996 pre-offer meeting, he asked Compuware CEO Pete Karmanos about the three- to five-year vesting period. "I had mentioned to him that I was concerned on the stock options . . that it was over a three- to five-year period," Phillips testified, "[Karmanos] said, 'Don't worry about that. The product is so good. It's sellable. You are an excellent salesman. You have an excellent track record. You will be around here over five years in order to take advantage of all the benefits and such and the commissions.'" Phillips also testified that "Pete Karmanos said that as long as I behaved myself, did my job, made the calls, those stock options would be mine. . . . He basically said that 'you will be here if you don't misbehave." Phillips testified that he understood these statements to be an oral guarantee of employment for three to five years. It is significant that Karmanos's alleged promise -- as clarified by Phillips' deposition testimony -- was not that Phillips' stock options would vest before his third anniversary of employment, but that Phillips should not worry about the vesting period, because he would be employed for at least three years in order to take advantage of the stock options. Thus, Phillips' "breach of stock option agreement" claim is in effect a wrongful discharge claim, because the only alleged promise was that Phillips would be discharged only for cause during his first five years of employment.

A few weeks after Karmanos' alleged promise, Compuware's June 25, 1996 offer letter to Phillips reaffirmed the three- to five-year vesting period for the options, but did not mention any agreed term of employment. The "Employee

Agreement," signed by Phillips on July 8, 1996, his first day on the job, provided that "Compuware recognizes the right of each employee to terminate his employment for any reason, and Employee agrees that Compuware retains its right to terminate his employment, with or without cause, and with or without notice at any time." Phillips testified that be read and understood these provision before signing the documents, but at the time he believed he had a prior oral agreement with Karmanos that he would be employed by Compuware for three to five years, long enough for his stock options to vest, and that during that time he would not be terminated except for cause.

Michigan law provides that "[w]hen an employment contract expressly provides for employment at will, a plaintiff, by signing the contract, assents to employment at will and cannot maintain a cause of action based on a prior oral agreement for just-cause employment" Novak v. Nationwide Mutual ins. Co., 599 N.W.2d 546, 549-50 (Mich. Ct. App. 1999). In Novak, the plaintiff, a sales agent, alleged that a company representative told him in pre employment negotiations "that the at-will termination provision in the written employment contract would not apply to him." Id. at 550. The written employment agreement subsequently signed by the plaintiff provided that if the plaintiff "successfully handled" certain accounts for two years, he would then begin to receive full commissions but it also provided that the plaintiffs employment was terminable at will by either party. Id. The plaintiff was in fact fired after about a year and a half of employment, and the plaintiff sued for breach of contract. id. at 549. The Michigan court held that the alleged oral agreement "did not negate the at-will provision in the written contract, which also contained a provision requiring that modifications of the contract be in writing and be signed by a company representative." Id. at 550. The Michigan appellate court then affirmed the lower court's grant of summary judgment to the employer on the plaintiffs breach of contract

claim. Id. fn11 The Court finds that the facts of this case are similar to those in Novak. Phillips alleges a pre-employment oral promise of guaranteed employment for a specified term and discharge only for cause, but the written contract, which was executed after the oral agreement, provided clearly for at-will employment, and stated that its terms would "supersede any and all contrary terms and conditions of employment that may have been in existence prior to the execution of this agreement" and could "be modified only by written agreement between the employee and the director of personnel." For these reasons, Compuware's motion for summary judgment is GRANTED with regard to Phillips' breach of contract claim. Fn12

D. Common Law Fraud

Phillips' complaint alleges that "Compuware made false and misleading statements to Mr. Phillips concerning the stock options promised to him as the primary consideration for his employment," specifically that "Compuware promised that it would not terminate Mr. Phillips or otherwise refuse to honor the [stock] options without good cause." Phillips alleges that he relied on these false statements to his detriment by leaving his previous employer and agreeing to come to work for Compuware. Phillips is apparently referring again to the June 1996 discussion in which Karmanos allegedly told him that Phillips should not worry about the stock option vesting period, because he would be employed for at least three years in order to take advantage of the stock options. Phillips alleges that Compuware "knew that these statements were false and misleading when made," because "Compuware never intended to honor the options except for good cause only, but rather intended to refuse to honor the options for any reason that it arbitrarily deemed expedient."

Under Michigan law, the elements of fraud are: "(1)

the defendant made a material misrepresentation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff act on it, and (5) the plaintiff acted upon it and suffered damages as a result." Novak v. Nationwide Mutual ins. Co., 599 N.W.2d 546, 553 (Mich. Ct. App. 1999). The plaintiff's reliance on the misrepresentation must be reasonable. Id. at 554 (holding that "a person who unreasonably relies on false statements should not be entitled to damages from misrepresentation").

Both Michigan and Texas courts have rejected contracting parties' attempts to fashion a fraud claim out of an oral misrepresentation made during contract negotiations that directly contradicts the terms of the final written contract. In Novak, the plaintiff tried to recover under a fraud theory for a pre-employment oral promise that the employee would only be discharged for cause. Id. at 553. The Novak court held that the written contract the plaintiff had signed, with its express employment-at-will language and integration clause, expressly contradicted the alleged prior oral representation that termination would be only for cause. Id. at 553. Therefore, the plaintiff's alleged reliance on the representation was unreasonable, and summary judgment on the fraud claim was affirmed. Id; see also Nieves v. Bell Industries, Inc., 517 N.W.2d 235, 238 (Mich. Ct. App. 1994) (holding that plaintiff acted unreasonably in relying on oral statements that were contradicted by a written employment agreement); see also McCreery v. Seacor, 921 F. Supp. 489, 492-94 (W.D. Mich. 1996). In the McCreery case, the plaintiffs' prospective employer made oral promises that the plaintiffs would not be terminated if a particular account was lost. Id. at 493. However, the written employment contracts subsequently signed by the plaintiffs "had clear, written language regarding the terms and conditions of their employment directly contradicting the very representations

upon which plaintiffs claimed they relied. The plaintiffs' letter of engagement said that their employment could be terminated 'at will and at any time.' . . . In the face of this language, it cannot be said that plaintiffs 'reasonably relied' upon representations contrary to this written language. Id. Similarly, Phillips cannot have reasonably relied upon a rather vague oral assurance that Phillips "will be around here over five years" to collect stock options, in the face of the specific contractual language stating that Phillips' employment could be terminated "with or without cause, and with or without notice at any time."

Texas law is in accord. See, e.g., Fisher Controls Intern. v. Gibbons, 911 S.W.2d 135, 140 (Tex. App.--Houston [1st Dist.] 1995, writ denied), In Fisher, the defendant orally represented to the plaintiff before they signed a sales representative agreement that the defendant would later extend the term of the agreement. The proposed written agreement stated that the agreement's term would be three years and that there was no obligation on either party to renew the agreement, and that "each party, in its sole discretion, shall have the right to determine, for any reason whatsoever, not to renew, continue or extend this Agreement." Id. at 141. The plaintiff expressed concern about this provision before he signed the contract, because he was counting on having the contract for at least five years to pay off a five-year promissory note, but a representative of the defendant told him that the contract language calling for the three-year term was "nothing more than a mere formality," urged the plaintiff to "Trust me" and reassured him that the company had never terminated such a contract after three years. Id. at 140. The plaintiff was told: "If you sell your quota or your goals every year, you are going to have it [the position] until you get [the five-year promissory note] paid off." Id. The plaintiff signed the contract, and when the defendant terminated the contract after the three-year term, the plaintiff sued for fraud. The court held that

because the plaintiff read the contract before signing it and unambiguously agreed to a three-year term, he "cannot recover for misrepresentations concerning the length of the agreement." Id. at 141. "Negotiations preceding a written contract should not displace the terms of the written contract," the court held. An experienced party who voluntarily signs an unambiguous contract "should not be allowed to claim fraud in any earlier oral statement inconsistent with a specific contract provision. . . . Otherwise, contracts would be 'nothing more than a scrap of paper." Id. at 14 1-42; see also Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 540 (Tex. 1987). In Fina, a bank assured the plaintiff that the extension of a letter of credit had the legal effect of also extending the time in which exchange imbalances would be covered under the credit. Id. at 539. In fact, the extension did not have the legal effect that the bank assured the plaintiff it did. The plaintiff sued for fraud, but the Texas Supreme Court held that the parties were "two equally sophisticated business entities" who were "dealing at arm's length," and that therefore the plaintiff had an obligation to exercise ordinary care by making its own examination of the documents to satisfy himself of their effect before accepting the other party's assertion as fact. Id. at 540-41. In light of these principles. the Court concludes that Phillips cannot raise a genuine issue of material fact that it reasonably relied on Compuware representatives' verbal statements, because the statements contradicted the unambiguous terms of the contract documents that Phillips read, understood and executed. See Novak, 599 N.W.2d at 553; Nieves, 517 N.W.2d at 238; McCreery, 921 F. Supp. at 492-94; Fisher Controls, 911 S.W.2d at 141-42; Fina, 726 S.W.2d at 540-41.

In addition, there is no evidence in this record tending to show that the promise that Phillips would "be around" Compuware for five years was made with the present intention not to perform. Under Michigan law, future

promises are contractual and do not constitute fraud, except when made "with bad faith intent not to fulfill the promise at the time it was made." See Liberty Heating & Cooling, Inc. v. Builder's Square, 788 F. Supp. 1438, 1444 (E.D. Mich. 1992) (citing Hi-Way Motor Co. v. Int'l Harvester Co., 247 N.W.2d 813, 816 (1976)). Thus, in order to prove fraud based on a future promise, the plaintiff must "demonstrate that the defendant made the future promise in bad faith." See Liberty, 788 F. Supp. at 1444. To prove fraudulent intent, the evidence offered by the plaintiff "must relate to the conduct of the actor at the very time of making the representations, or almost immediately thereafter." Id (quoting Hi-Way, 398 Mich. at 338-39). To avoid summary judgment, Phillips must come forward with evidence of "circumstances which existed contemporaneously with the promise," which show that Karmanos made the promise with no intention of performing it. Id. at 1445 & n.4 (noting that when the promise is of a "contingent nature," it is unlikely that bad faith can be shown by evidence of events occurring before the contingencies do or do not take place).

Texas law is in accord. See Formosa Plastics Corp. v. Presidio Engineers and Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998). The Texas Supreme Court held in Formosa that a promise of future performance constitutes an actionable misrepresentation only if the promise "was made with no intention of performing at the time it was made." Id. "[T]he mere failure to perform a contract is not evidence of fraud. Rather, [the plaintiff] had to present evidence that [the defendant] made representations with the intent to deceive and with no intention of performing as represented. Moreover, the evidence presented must he relevant to [the defendant]'s intent at the time the representation was made." Id (citations omitted).fn13 The Court concludes that Phillips has not raised a genuine issue of material fact as to whether Karmanos' promise was made with the bad faith intent not to perform. For these reasons, Compuware's motion for

summary judgment is GRANTED as to Phillips' common law fraud claim.fn14

E. Securities Fraud

Phillips claims that Compuware, by falsely promising that the stock options "would be honored except for good cause," engaged in fraud in a transaction involving securities in violation of the federal Securities Acts of 1933 and 1934, 15 U.S.C. § 77 et seq. and the Texas Blue-Sky Laws, TEX. BUS. & COM. CODE § 27.01 and TEX. REV. CIV. STAT. ANN. ART. 58 1-33 et seq. Phillips' securities fraud claims must fail for the same reasons as his common law fraud claim -- because he cannot show that the promise at issue was false when made, and because any reliance on an oral promise contradictory to the written contract was not reasonable or justifiable. See, e.g., Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014, 1025 (5th Cir. 1990) (holding that the elements of a securities fraud claim under Tax. Bus. & COM. CODE § 27.01 are "derived from Texas common law fraud, therefore the court's holdings regarding elements of common law fraud claim also applied to securities fraud claim); In re Compaq Securities Litigation, 848 F. Supp. 1307, 1312 (S.D. Tex. 1993) (same).

Furthermore, securities fraud statutes do not apply to "an employment dispute that center[s] on stock options," especially when the stock options have not yet vested. See Beebe v. Compaq Computer Corp., 940 S.W.2d 304, 307 (Tex. App.--Houston [14th Dist.] 1997). In Beebe, the plaintiffs were employees at will who were participants in the defendant employer's stock option plan. Id. at 305. The plaintiffs alleged that the defendant orally represented to them that their stock options would continue to vest during an unpaid leave of absence. However, the employer gave the plaintiffs written notice that the vesting of the stock options would be suspended during the leave of absence. Id. The

plaintiffs sued for securities fraud based on their contention that the employer intentionally misrepresented its policy regarding the vesting of stock options. Id. at 306. Relying on federal securities fraud cases, the court affirmed summary judgment for the employer, holding that the plaintiffs could not recover under Texas securities fraud statute because their options never vested, and therefore no stock transaction ever took place. Id. at 307 ("Appellants never made an investment decision to buy or sell stock; they merely held an option which failed to vest."). Similarly, in Stephanz v. Laird, 846 S.W.2d 895, 905 (Tex. App--Houston [1st Dist.] 1993), the plaintiff's employment contract provided that the plaintiff had to be employed for 18 months before his stock options would begin to vest. Id at 903. The plaintiff was fired before the end of the 18-month period, and he sued the employer for fraud and securities fraud based on several alleged misrepresentations regarding the company's financial health and the possibility that the plaintiff would become a part owner in the company. Id. The plaintiff alleged that these misrepresentations fraudulently induced him to accept employment with the company. Id. The court held that the plaintiff could not bring a securities fraud claim under Tax. Bus. & COM. CODE § 27.01. "It is clear that [the plaintiff] was required to meet certain conditions precedent in order for the stock options to begin vesting, among those that [the plaintiff] be employed at [the defendant company] for a period of 18 months. These conditions precedent set out in the employment letter were not satisfied. We hold that in this case, the [securities fraud] statute does not apply. ' Id. at 905 (rendering judgment that the plaintiff take nothing on his fraud and securities fraud claims); see also Gurwara v. Lyphomed, Inc., 739 F. Supp. 1162, 1165-67 (N.D. Ill. 1990), aff'd, 937 F.2d 380 (7th Cr, 1991). In Gurwara, the plaintiff brought a federal securities fraud claim, complaining of his employer's misrepresentations concerning the circumstances under which his stock options would vest. id. at 1169. The court found that the plaintiff could not bring a

claim under 15 U.S.C. § 78j(b), because the plaintiff's stock options never vested and therefore no investment decision took place. Id. Similarly, Phillips' stock options never vested, and no transaction involving securities ever took place.

For these reasons, Compuware's motion for summary judgment is GRANTED on Phillips' state and federal securities fraud claims.

F. Promissory Estoppel/Estoppel in Pais

The Court first notes that "estoppel in pais," also called equitable estoppel, is not a cause of action under Michigan law, but is only a defense. However, the Michigan Supreme Court has adopted the Restatement definition of promissory estoppel, which does provide a cause of action in Michigan:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

See State Bank of Standish v. Curry, 500 N.W.2d 104, 107 (Mich. 1993) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90). The reliance interest protected by promissory estoppel is "reasonable reliance," and reliance is reasonable "only if it is induced by an actual promise." Id. at 107 (noting that "the sine qua non of the theory of promissory estoppel is that the promise be clear and definite") Michigan courts caution that they will "exercise caution in evaluating an estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted." Novak, 599 N.W.2d at

552 ("Here, assuming arguendo that one of the defendants' employees told the plaintiff that the at-will provision in the written contract did not apply to him, the circumstances surrounding the statement precluded an objective finding of a clear and definite promise of just-cause employment, because the signed contract contained an at-will provision, along with an integration clause, that expressly contradicted the alleged oral representation. Therefore, plaintiff's employment with defendants was terminable at will, and the trial court properly dismissed plaintiff's promissory estoppel claim."); see also McCormick v. Sears, Roebuck and Co., 712 F. Supp. 1284,1287-88 (W.D. Mich. 1989). In McCormick, the plaintiffs employment application provided expressly for at-will employment, but she relied on a manager's oral assurances that if the plaintiff's sales were unsatisfactory, she would not be terminated, but would be transferred to another department. Id. at 1287. After the plaintiff was discharged for poor sales, she sued the employer under a theory of promissory estoppel. The court granted summary judgment for the employer on the promissory estoppel claim, holding that "[i]n the face of the clear language of the employment application, [the manager]'s oral representations were ineffective as a matter of law to alter the at-will status of the employment relationship." Id. at 1288. Under these authorities, the Court concludes that Phillips' promissory estoppel claim cannot withstand Compuware's motion for summary judgment.

Phillips' promissory estoppel claim would also fail under Texas law. See Gilmartin, 985 S.W.2d at 557-58 (holding that employer's promise to plaintiff that his "contract would be renewed so long as his work was satisfactory," was merely a "vague assurance that no reasonable person would justifiably rely on," and was "too indefinite to permit estoppel causes of action"). Under Texas law, "neither promissory estoppel nor equitable estoppel is available to avoid termination at will." Id. at 558; see also

Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 142 (Tex. App.--Houston [14th Dist.] 1999, writ denied) ("In Texas, the long-standing rule provides for employment at will, terminable at any time by either party, with our without cause, absent an express agreement to the contrary. Reliance on a supposed promise of continued employment is unjustified. . . . [P]romissory estoppel is not available to avoid termination at will.") (citations omitted).

For these reasons, Compuware's motion for summary judgment is GRANTED as to Phillips' promissory estoppel claim.

IV. Conclusion

Accordingly, for the reasons stated in this order, Compuware's motion for summary judgment (Dkt. # 20) is GRANTED, and all of Phillips' claims are dismissed with prejudice. Compuware's motion to strike certain evidence (Dkt. # 40) is DENIED.

Signed this 17 th day of February, 2000.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

Footnotes

fn1These accounts were not actually taken away from Phillips until October 1997. The accounts were reassigned to Karl Antilla, age 43, who was hired on October 1, 1997 as a sales representative for Compuware's Dallas office.

fn2 Larrabee's a recollection of Cantrell' s comment is consistent, but Larrabee understood the "old guys" comment differently. Larrabee stated that "my interpretation of that comment from Alan was, and in the context of which it was stated was, that if' the existing people, regardless of whether they're 30 or 60, don't perform, they are going to be separated . . . or terminated. That to me is a perfectly valid statement. . . . It had nothing to do with age in terms of physical age."

fn3 Phillips' sales began to improve somewhat during the fall of 1997. The summary judgment record shows that Phillips' sales for his entire employment with Compuware totaled $106,107.

Fn4Larrabee and Shevillo deny that Phillips mentioned the "old guys" comment on July 28, 1997, but the Court must view the evidence in the light most favorable to Phillips, and will assume that Phillips did mention the "old guys" comment.

Fn5Phillips' age discrimination and federal securities fraud causes of action, of course, are governed by federal law. His Texas securities fraud claims will be analyzed under Texas law.

Fn6 See, e.g., Fowler v. Carrollton Public Library, 799 F.2d 976 (5th Cir. 1986); Nichols v. City of Jackson, 848 F. Supp. 718, 723 n. 10 (S.D. Miss. 1994) ("In the Fifth Circuit, constructive discharge has taken two basic forms, The first type normally involves a general course of 'on the job' harassment against the employee by the employer. The

second form traditionally arises when an employer informs the employee that he must resign or be fired.").

Fn7Nathan, Compuware's president, testified by affidavit that "the original Uniface sales force that came to Compuware as part of the acquisition of the Uniface Company was commonly referred to as the 'old' sales force," and "Phillips was not a part of the 'old' sales force, he was a part of the 'new' sales force employed after the Uniface organization had been integrated into the Compuware organization."

fn8 John Jalovec, 40, was hired on September 1, 1997. Ike Putterman, 50, was hired on December 22, 1997. Tom Lindsay, 41, was hired on January 19, 1998. Larry Nash, 42, was hired on June 16, 1998. Bill Hood, 53, was hired on October 5, 1998. Rich Lauer, 53, was hired on October 12, 1998.

Fn9The June 25, 1996 offer letter, which Phillips signed on July 8, 1996, also made clear that the vesting schedule of the promised stock options would be 50 percent after three years, 25 percent after four years, and 25 percent after five years.

Fn10 It is undisputed that by November 1997, Phillips was no longer employed by Compuware.

fn11Texas law is in accord. See, e.g., Gilmartin v. KYT V-Channel 13, 985 S.W.2d 553, 555-56 (Tex. App.--San Antonio 1998) (affirming summary judgment for employer on breach of employment contract claim, holding that "[g]eneral promises or assurances that an employee will not be discharged if he performs satisfactorily or that the employee will only be terminated for 'good cause' do not constitute a binding contract. An employee must reveal a more formal agreement with the employer to modify at-will

employment."); see also Fisher Controls, Int'l, Inc. v. Gibbons, 911 S.W.2d 135, 141-42 (Tex. App.-- Houston [1st Dist.] 1995, writ denied) (holding that "[n]egotiations preceding a written contract should not displace the terms of the written contract," and that when employee signs a written contract with provisions that contradict an earlier oral agreement, the employee cannot bring a breach of contract claim based on the oral agreement. "Otherwise, contracts would be 'nothing more than a scrap of paper").

fn12 Phillips alleges in his summary judgment response that Compuware also breached a contract with him by refusing to honor Rick Schroeder's pre-offer oral promise that Phillips would be assigned certain accounts for a 24-month period. The Court first notes that Phillips did not plead this claim. Furthermore, the claim is without merit for the same reasons as the "breach of stock option agreement" claim -- the written contracts subsequently signed by Phillips superseded any previous oral agreements.

fn13 The Formosa case provides an example of what type of evidence is required to establish a fraudulent intent not to perform a promise. In that case, the defendant company's representative admitted on the witness stand that -- two weeks before the execution of a contract providing that the plaintiff would have control over concrete deliveries -- the defendant company decided to take over the delivery of concrete itself without informing the plaintiff, to save money. Formosa, 960 S.W.2d at 48-49. The plaintiff was not informed of this decision until after the contract was signed, and the defendant company representative admitted that he knew that the plaintiff would rely on the concrete delivery provision in preparing its bid. Id.

fn14 In his summary judgment response, Phillips attempts to recast his fraud claim by asserting that Compuware made

false assertions of fact regarding the "performance and prospects" of the Uniface product, which fraudulently induced him to forego other employment opportunities and agree to work for Compuware. Again, Phillips did not plead this claim. Furthermore, such a claim is meritless. The alleged statements -- that Uniface was "a dynamic and successful product . . . suitable for multi-million dollar deals," that previous problems had been fixed, that Uniface was "ready to succeed -- were in the nature of opinion or "puffing," and were not statements of fact upon which Phillips could reasonably rely. See, e.g., Van Tassel v. McDonald Corp., 407 N.W.2d 6, 9 (Mich. Ct. App. 1987) (statements that proposed business was a "gold mine" and that the plaintiff "was not going to lose money" were merely opinion or puffing and would not support a fraud claim).